

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 8, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1685

Cir. Ct. No. 2011CV1

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DARLENE SUSAN HOSTO,

PLAINTIFF-APPELLANT,

V.

JOHN REBHAN AND PAULA REBHAN,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Richland County:
WILLIAM ANDREW SHARP, Judge. *Affirmed.*

Before Kloppenburg, P.J., Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. This appeal arises out of the termination of a written lease to use farm property entered into by Darlene Hosto, the property

owner, and John and Paula Rebhan.¹ Rebhan entered into a three-year written lease with Hosto for the use of several buildings on her farm, including livestock pens where Rebhan held cattle, and land on which Rebhan grew alfalfa and corn. The circuit court found that the parties extended the written lease for another three years by way of an oral agreement, to commence on January 1, 2011. Hosto terminated the written lease in September 2010, to be effective on December 31, 2010, in keeping with the terms of the written lease. Rebhan sued Hosto for breach of the oral lease and Hosto sued Rebhan for breach of the written lease. A trial was held to the circuit court, which awarded damages to both parties.

¶2 Only Hosto appeals. Hosto challenges the circuit court's judgment awarding damages to Rebhan and the dismissal of Hosto's claim for lost rental profits for livestock pens she leased to Rebhan. Hosto argues that Rebhan is not entitled to recover any damages, that the court erred in denying her claim for lost rent on use of the livestock pens, and that the damages awarded to Rebhan are not supported by the record. For the reasons that follow, we reject Hosto's arguments and affirm.

BACKGROUND

¶3 Hosto entered into a written lease agreement² with Rebhan that was to run from March 1, 2008, until December 31, 2010. Under the terms of the written lease, either party could seek renewal of the agreement or termination of the agreement by providing notice to the other party by October 1 of the last year

¹ We will generally refer to the defendants collectively as Rebhan.

² Pertinent sections of the lease will be quoted in the Discussion section.

of the contract, which, in this case, was October 1, 2010. The written lease allowed Rebhan to cultivate thirty acres of Hosto's farm in 2008 and fifty acres in the next two years. The written lease also allowed Rebhan to use the livestock pens, pasture, granary, and hayloft on the property from April 1, 2008, until December 31, 2009. On September 13, 2010, Hosto notified Rebhan that she was terminating the written lease and required Rebhan to vacate the property by December 31, 2010.

¶4 A two-day court trial was held. At the close of evidence, the court determined that Rebhan was more credible than Hosto on the topic of whether there was an oral agreement to extend the terms of the written lease. The circuit court found that the parties entered into an oral agreement in Spring 2009 to extend their agreement for use of the property for another three years, specifically 2011 through 2013. Following briefing on whether the oral lease violated the statute of frauds, the court issued a memorandum decision ruling that Rebhan is "entitled to an equitable exception to the operation of the Statute of Frauds, based on equitable estoppel," pursuant to WIS. STAT. § 706.04(3) (2013-14).³

¶5 A hearing on damages was subsequently held, where the court heard arguments by counsel. At the hearing, Rebhan conceded that he owed Hosto \$1750 for unpaid ground rent, and \$500 for unpaid rent for use of the livestock pens during the last two months of the written lease.

¶6 On May 9, 2014, the court issued a second memorandum decision, awarding Hosto \$2250 in undisputed damages for unpaid ground rent and rent for

³ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

the livestock pens; dismissing Hosto's claims for additional lost rent for the livestock pens and for damages related to the condition of the rented fields; and awarding \$41,292.50 in damages to Rebhan based on his expected income from the 2011-2013 alfalfa and corn crops. The court entered an amended judgment on September 30, 2014, awarding Rebhan \$45,927.50 in total damages, fees, costs, and interest, after offsetting the \$2250 damages awarded to Hosto.

DISCUSSION

¶7 On appeal, Hosto attempts to make three primary arguments: (1) that Rebhan is not entitled to recover damages because Rebhan breached the lease and the circuit court erroneously applied promissory estoppel principles in granting damages to Rebhan; (2) that the circuit court erred by denying Hosto's claim for \$1800 in damages for lost rent of the livestock pens; and (3) assuming that Rebhan is entitled to recover damages, that the evidence does not support the damages awarded by the court. As we now discuss, we deem the first argument insufficiently developed to justify analysis and reject Hosto's other two arguments on the merits as best we understand them.

A. Rebhan can recover damages

¶8 Hosto asserts that Rebhan is not entitled to recover damages for two reasons: (1) because Rebhan breached the written lease; and (2) because the circuit court erroneously awarded Rebhan damages applying promissory estoppel principles, which Hosto argues are unavailable when there is a contractual relationship, such as in this case. As for Hosto's first argument, she attempts to argue that Rebhan breached the written lease in several respects, and therefore, applying general rules of contract law and Section 5 of the written lease, Rebhan

cannot recover damages. We do not address this argument because Hosto does not develop it.

¶9 The entire purported argument is Hosto's conclusory assertion that Rebhan breached the lease, and therefore, is not eligible to recover damages. The rest of this section is limited to a summary of the circuit court's ruling on this topic, statements of law, and a list of the four alleged breaches that Hosto identified in her notice of termination. The briefing lacks any analysis of the law, citation to facts in the record supporting the breach allegations, or application of the pertinent law to the facts. Because Hosto does not present a developed argument on this topic, we do not consider it further. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to address inadequately developed arguments).

¶10 We reject Hosto's promissory estoppel argument for the same reason. She asserts that the circuit court erred by awarding damages to Rebhan by applying promissory estoppel principles. Hosto's argument on this topic consists only of citing case law that purportedly applies and making the following conclusory statement:

In this case, after the trial court orally modified the parties' written contract by extending its term for 3 years, equitable principles had no further relevance in this case because the lease addressed all of the elements of the parties' relationship.

There is nothing more to Hosto's argument on this topic other than the above statement. We will not serve as an advocate on Hosto's behalf, and accordingly, do not consider her argument further. *See id.* at 647.

B. Livestock Pens

¶11 In the circuit court, Hosto argued that Rebhan’s failure to maintain the livestock pens limited her ability to rent the pens at a rate of \$300 per month, which is \$50 more than the amount she subsequently rented to a friend and neighbor, Nelson Culp. On this ground, Hosto sought damages in the amount of \$1800 from Rebhan for his alleged failure to maintain the livestock pens. In support of her claim, Hosto testified that the livestock pens had problems draining and required ongoing maintenance, which, she contends, Rebhan was required to perform under the lease. Hosto points to her own testimony that she had experience renting out the farm after her husband died in May 2007, that she was aware of the amount of effort it would take to return the pens to a reasonable condition, and that she believed that she could have rented the pens for \$300 per month if Rebhan maintained the pens in keeping with the terms of the lease. According to Hosto, “she was qualified to give the opinion that she gave and it was received without objection and it was unrebutted.”

¶12 In denying Hosto’s claim, the circuit court reasoned that “there is no evidence to support her claim that she could have received more money or that the amount would have been \$50.” On appeal, Hosto contends that her testimony provided more than ample evidence to support her claim for \$1800. We reject her arguments for two reasons.

¶13 First, by relying on evidence viewed in a light that favors her claim, Hosto ignores our standard of review. “When we review a damage award in either a bench or jury trial, we do not substitute our judgment for that of the fact finder, but rather determine whether the award is within reasonable limits; and we view the evidence in the light most favorable to support the damage award.” *Teff v.*

Unity Health Plans Ins. Corp., 2003 WI App 115, ¶41, 265 Wis. 2d 703, 666 N.W.2d 38.

¶14 Second, as the finder of fact, the circuit court was not required to accept Hosto's testimony that she would have been able to rent the livestock pens for \$50 more per month if not for poor conditions resulting from failures by Rebhan to sufficiently maintain them. A trial judge, acting as a finder of fact, weighs the testimony and is the ultimate arbiter of the credibility of the witnesses. See *Posnanski v. City of West Allis*, 61 Wis. 2d 461, 465, 213 N.W.2d 51 (1973). Hosto testified that she rented the livestock pens to Culp at the rate of \$250 per month after Rebhan moved his cattle off the farm. Hosto testified that she did not seek any potential renters for the livestock pens other than Culp because she trusted him. The circuit court, as the finder of fact, could reasonably view Hosto's testimony as failing to support her claim that she could have rented the pens for \$300 per month rather than the \$250 per month she charged Culp, but for lack of maintenance by Rebhan. "[T]he findings of a trial court ... will not be set aside on appeal unless they are contrary to the great weight and clear preponderance of the evidence." *Gehr v. City of Sheboygan*, 81 Wis. 2d 117, 121, 260 N.W.2d 30 (1977) (applying the great weight and clear preponderance of the evidence standard); see also WIS. STAT. § 805.17(2).

C. Alfalfa Crop Damages

¶15 Rebhan sought damages from Hosto for lost income from the alfalfa crops that he planted in 2009 but was unable to harvest in 2011, 2012, and 2013, due to Hosto's breach of the oral lease agreement. Rebhan planted alfalfa on the farm in 2009. The circuit court implicitly found that the alfalfa crop planted by Rebhan yielded crops for five years. Based on Hosto's agreement to extend the

lease, the circuit court awarded Rebhan damages for lost income from the alfalfa crops that were harvested by others in 2011 and 2012, and expectation damages for 2013. The court calculated Rebhan's damages for 2011 and 2012, the third and fourth years of the alfalfa crop, based on the yields reported by Jason Fuller and Nelson Culp, both of whom rented Hosto's land and continued to harvest the alfalfa that Rebhan planted in 2009.⁴ Hosto's only dispute is with damages that the court awarded Rebhan for the 2013 crop, which was the fifth year of the alfalfa crop. The court awarded damages to Rebhan for the 2013 alfalfa crop based on Rebhan's projections of a yield of 94.9 tons.⁵

¶16 Hosto argues that the circuit court erred in awarding damages for the 2013 alfalfa crop for two reasons. First, she asserts that “the trial court applied a different standard of proof to [the] Rebhans by awarding them damages [for the lost alfalfa crop in the fifth year,] without supporting evidence, than the standard the trial court applied to Hosto's livestock pen damage claim.”

¶17 This first assertion is hard to understand as an argument, but at a minimum it ignores the critical point that, as the finder of fact, the circuit court may accept or reject any part of a witness's testimony, and weigh the credibility of

⁴ Culp entered into an agreement with Hosto allowing Culp to farm, beginning in 2011, the same land at issue in the Hosto-Rebhan agreements. However, Jason Fuller and Kreg Holgerson farmed the land in 2011, before Culp took over for pertinent years 2012 and 2013.

⁵ In relying on Rebhan's projections of what he would have harvested, the court said that “[t]here was no other evidence presented on [the] issue.” The court did not refer to Culp's testimony that the alfalfa yield in 2013 was about 4 tons per acre or 88 tons. However, 88 tons is reasonably close to Rebhan's projection of 94.9 tons. Moreover, Hosto fails to argue that the court should have selected 88 tons instead of 94.9 tons as a reasonable estimate of what Rebhan would have harvested. See *Teff v. Unity Health Plans Ins. Corp.*, 2003 WI App 115, ¶41, 265 Wis. 2d 703, 666 N.W.2d 38 (a reviewing court does “not substitute [its] judgment for that of the fact finder, but rather determine[s] whether the award is within reasonable limits; and we view the evidence in the light most favorable to support the damage award”).

each witness. We reject this different-standard-of-proof concept as an argument because Hosto fails to explain why we should conclude that the court did not properly do so in this case.

¶18 Hosto's second argument is absurd. Hosto argues that there is insufficient evidence that alfalfa grows in the fifth year after it is planted. As noted above, it is undisputed that alfalfa grew in this case in the fifth year after it was planted by Rebhan. To put it mildly, this is sufficient evidence on which the circuit court could rely.

D. Corn Damages

¶19 Hosto vaguely suggests that the circuit court erred by not reducing the damages awarded to Rebhan for lost corn profits in 2011, 2012, and 2013 even though it ruled that Rebhan mitigated those damages. This suggestion involves the fact that Rebhan "rented other land on which [he] grew corn in each of those years." This may suggest an argument that the court should have found that Rebhan in fact mitigated the corn damages by growing corn on other rented land, and therefore, he is not entitled to any damages for his corn losses, or is entitled only to reduced damages. Assuming this to be Hosto's argument, we reject it because she fails even to attempt to support it by citing to specific, pertinent record evidence.

¶20 Although Hosto fails to cite a legal standard, we note that an aggrieved party to a breach of contract has a "duty" to mitigate damages, but at the same time, although the breaching party has the right to an offset of the damages to the extent that the injured party mitigates damages, the breaching party bears the burden of proof to show how much the damages should be reduced by in part or in whole. *Cf. Sprecher v. Weston's Bar, Inc.*, 78 Wis. 2d 26, 42, 253 N.W.2d

493 (1977); *State ex rel. Schilling v. Baird*, 65 Wis. 2d 394, 398, 222 N.W.2d 666 (1974); *Schiller v. Keuffel & Esser Co.*, 21 Wis. 2d 545, 552-53, 124 N.W.2d 646 (1963); *Barker v. Knickerbocker Life Ins. Co.*, 24 Wis. 630, 638 (1869). Thus, while it is true that Rebhan had a duty to mitigate his damages by making reasonable efforts to avoid or minimize those damages, Hosto had the burden to identify to the circuit court evidence upon which the court was obligated to find that the damages awarded to Rebhan for his lost corn profits for 2011-2013 should be reduced, which Hosto did not do.

¶21 Although Hosto asserts that Rebhan’s corn damages should be “eliminat[ed],” suggesting that Rebhan should not receive any amount of damages for his lost corn profits, Hosto completely fails to point to evidence that would affirmatively show how much money Rebhan did or could have made through growing corn elsewhere, and then affirmatively point to appropriate offset figures. In short, Hosto points to no evidence that suggests that Rebhan’s corn damages should be reduced at all.

CONCLUSION

¶22 Based on the foregoing reasons, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

